



AD-A272 292



December 23, 1974
NUMBER 5400.9

GC, DoD

2

Department of Defense Directive

SUBJECT Publication of Proposed and Adopted Regulations
Affecting the Public

- References:
- (a) 5 USC 551
 - (b) 5 USC 552
 - (c) 5 USC 553
 - (d) DoD Directive 5400.7, "Availability to the Public of Department of Defense Information," June 23, 1967
 - (e) Federal Register Handbook on Document Drafting, General Services Administration

I. PURPOSE

This Directive:

- A. Establishes a policy and procedure by which the Department of Defense will invite the comments of the public on those of its proposed regulations and other types of rule making as described hereafter which originate within the Department of Defense a requirement of general applicability and future effect designed to implement, interpret, or prescribe law or policy, or practice or procedure requirements of a component. This requirement applies to those regulations which constitute the authority for actions having a substantial and direct impact on the public when consistent with other responsibilities of the Department for the efficient and responsible conduct of public business.

This document has been approved
for public release and sale; its
distribution is unlimited

93-26794



- B. Implements the provisions of 5 USC 552 (reference (b)) relating to the kinds of regulations that must be published in the Federal Register after they are adopted.

II. CANCELLATION

Section V. of DoD Directive 5400.7 (reference (d)) is hereby superseded and cancelled.

III. APPLICABILITY AND SCOPE

- A. The provisions of this Directive apply to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, and the Defense Agencies (hereinafter referred to singularly as a "DoD Component" or collectively as "DoD Components").
- B. These provisions are applicable to those directives, instructions, regulations, policy memoranda, manuals, and other forms of rule making (hereinafter referred to as "regulations") that have a substantial and direct impact on the public. Only a regulation which must be published in the Federal Register after its adoption in accordance with 5 USC 552 (reference (b)) (as implemented in section VI of this Directive) comes within the requirement that it be evaluated to determine whether it will have the substantial and direct impact on the public that warrants an invitation for public comment prior to its adoption. An implementation by a subordinate component of a regulation adopted by a component at a higher level within the Department of Defense is not deemed to "originate" a requirement of general applicability and future effect, and, therefore, does not fall within the scope of the obligation to invite public comment on its provisions.
- C. The determination by the component originating a regulation shall be final and conclusive in determining whether a regulation or a proposed regulation comes within the purview of this Directive. Consideration shall be given, however, to the definition of "rule making" found in 5 USC 551 (reference (a)) as it relates to the requirements of 5 USC 553 (reference (c)) in making this determination.

- D. The requirement for inviting public comment on a proposed regulation shall not be deemed applicable to any proposed regulation coming within one or more of the following exemptions or exceptions to the rule making procedures set forth in 5 USC 553 (reference (c)):
1. Any matter pertaining to a military or foreign affairs function of the United States which has been determined under the criteria of an Executive Order or statute to require a security classification in the interests of national defense or foreign policy.
 2. Any matter relating to (a) agency management (b) agency personnel, or (c) public contracts (e.g. the Armed Services Procurement Regulation), including nonappropriated fund contracts.
 3. Any matter involving (a) interpretative rules, (b) general statements of policy, or (c) rules of agency organization, procedure, or practice;
 4. Any situation in which the DoD Component for good cause finds that inviting public comment on a proposed regulation is (a) impracticable, (b) unnecessary, or (c) contrary to the public interest, and incorporates in the adopted regulation that determination and its basis.
- E. Exceptions to the requirement in 5 USC 552 (reference (b)) for publication in the Federal Register of adopted regulations for the guidance of the public shall be made in accordance with guidance provided in section VIII. of DoD Directive 5400.7 (reference (d)).

IV. POLICY

- A. It is the policy of the Department of Defense to encourage the maximum practicable participation of the public in the formulation of regulations having a

Approved	
Date	
By	
Distribution	
Availability Codes	
Dist	Avail and/or Spec
A1	

substantial and direct impact on the public, and to inform the public fully through publication in the Federal Register of all adopted regulations intended for public guidance.

- B. A proposed regulation which would originate a Department of Defense policy having a substantial and direct impact on the public should be published, along with a notice of purpose and authority, in the Federal Register in order to invite public comment within a designated time at least 30 days prior to its intended adoption. This policy should be followed even though the proposed regulation may come within one or more of the exceptions or exemptions to the requirement for prepublication of proposed rules described in subparagraphs III. D. 2(a) and (b), 3, and 4, unless it is determined by the DoD Component as a matter within its sole and exclusive prerogative that the employment of the exception or exemption is appropriate to satisfy a significant and legitimate interest of the DoD Component or the public.
- C. After their adoption, all regulations for the guidance of the public shall be published in the Federal Register in accordance with 5 USC 552 (reference (b)), even though they may come within one or more of the exemptions described in section VIII. of DoD Directive 5400.7 (reference (d)), if no significant and legitimate interest of the DoD Component or public precludes such publication. This policy extends to some adopted regulations for the guidance of the public which were not the subject of notice and public comment.

V. PROPOSED REGULATIONS

- A. The general notice of a proposed regulation shall be published in the Federal Register in accordance with the guidance contained in reference (e) whenever that regulation would have a substantial and direct impact on the public or any significant portion of the public, unless it comes within one or more of the exceptions or exemptions previously set forth in subsection III. D. of this Directive.

- B. The notice shall include:
1. A statement of the purpose and objective of the proposed regulation;
 2. Reference to the legal authority under which the regulation is proposed; and
 3. The terms or substance of the proposed regulation.
- C. Whenever the originating DoD Component finds that notice and prepublication of a proposed regulation for public comment are impracticable, unnecessary, or contrary to the public interest, it shall incorporate that finding and a brief statement of its reasons in the adopted regulation, or it may adopt and publish in the Federal Register a separate regulation excepting or exempting categories of regulations for any of these reasons, with an explanation of the basis for excepting or exempting each particular category. Separate regulations for this purpose shall be promulgated by the procedures for proposed rules whenever this falls within the requirements of subsection V. A.
- D. Following the publication of notice and the proposed regulation in the Federal Register, the DoD Component shall give all interested persons an opportunity to participate in the rule making through the submission of written data, views, or arguments. An opportunity for oral presentation will normally not be provided, but may as a matter within the sole and exclusive prerogative of the component be extended where it is found to be in the interest of the DoD Component or the public. After careful consideration of all relevant matter presented, the component shall incorporate in the adopted regulation a concise general statement of its basis and purpose. A preamble to the adopted regulation may be published in the Federal Register to explain the relationship of the adopted rule to the proposed rule, including the nature and effect of public comments.

VI. PUBLICATION IN THE FEDERAL REGISTER OF ADOPTED
REGULATIONS AND OTHER MATTERS

Subject to the exemptions set forth in section VIII. of DoD Directive 5400.7 (reference (d)):

- A. Each DoD Component shall publish in the Federal Register an informative, current description for the guidance of the public, of where, how, and by what authority it performs any of its functions. In deciding which information to publish in the Federal Register a DoD Component shall consider the fundamental objective of informing all interested persons of how to deal effectively with the component.
- B. Information to be published in the Federal Register shall include:
 - 1. Descriptions of the central and field organization of the component concerned, and the established places at which, the employees or members of the armed forces from whom, and the methods whereby the public may secure information, make submissions or requests, or obtain decisions.
 - 2. The procedures by which a DoD Component conducts its business with the public, both formally and informally.
 - 3. The rules of procedure which must be followed, the description of forms which must be completed, or the source from which forms may be obtained, and instructions on the scope and content of papers, reports, or examinations required to be submitted pursuant to such rules of procedures, as adopted by the component.
 - 4. Directives, instructions, regulations, manuals, policy memoranda, statements of general policy, or interpretation of general applicability adopted by the agency, and other substantive rules of general applicability affecting the public.

- C. With the approval of the Director of the Federal Register, the requirement for publication in the Federal Register (1 CFR, Part 51, 37 F.R. 23614, Nov. 4, 1972) may be satisfied by reference in the Federal Register to other publications reasonably available to the class of persons affected and containing the information which must otherwise be published in the Federal Register.
1. In order to be eligible for incorporation by reference, the matter must be in the nature of published data, criteria, standards, specifications, techniques, illustrations, or other published information reasonably available to members of class affected thereby.
 2. Incorporation by reference is not acceptable as a complete substitute for promulgating in full text material required to be published by reference (b).
 3. Incorporation by reference is acceptable as a means of avoiding unnecessary repetition within the promulgated document of published information already reasonably available to the class affected. Examples include:
 - (a) Construction standards promulgated by a professional association or architects, engineers, or builders.
 - (b) Code of ethics promulgated by professional organizations.
 - (c) Forms and formats publicly or privately published and readily available to the persons required to use them.
- D. It is incumbent upon each component to review all information of the type described in section VI. B., to ensure that it is published on an up-to-date basis in the Federal Register, including every amendment

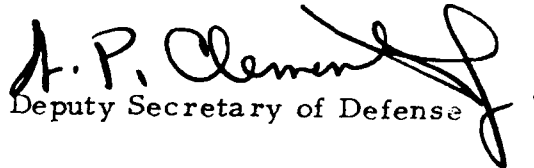
revision, or repeal. No member of the general public can be required to resort to, or be adversely affected by, any material not published as required by the foregoing provisions of section VI. unless he has actual and timely notice of the content of that material.

VII. PETITIONS

Each component shall accord any interested person the right to petition for the issuance, amendment, or repeal of a regulation that originates or would originate, for the Department of Defense or that component, a policy, requirement, or procedure coming within the scope of section V. of this Directive. Any such petition shall be given full and prompt consideration by the component charged with the responsibility for issuing such a regulation. The petitioner shall be advised in writing of the disposition, and the reason for the disposition, of any written petition for the issuance, amendment, or repeal of a regulation. The official responsible for disposition of the petition may at his absolute discretion, grant the petitioner a right to appear for the purpose of supporting his petition if this is compatible with the orderly conduct of public business.

VIII. EFFECTIVE DATE AND IMPLEMENTATION

This Directive becomes effective on February 1, 1975, but is applicable only to the regulations promulgated under the authority of a component after April 1, 1975. Two copies of implementing regulations shall be forwarded to the General Counsel of the Department of Defense on or before April 1, 1975.


Deputy Secretary of Defense